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IN THE

Supreme Court of the United States

October Term, 1942.

No. 603

STATE OF OHIO, on the relation of S. H. SQUIRE, Superintendent of Banks in Charge of the Liquidation of The Union Trust Company of Cleveland, Ohio,

Petitioner,

vs.

CLARENCE H. PORTER,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

EDWIN A. MESERVE
Of MESERVE, MUMPER & HUGHES,
615 Richfield Building,
Los Angeles, California,
Counsel for Respondent.

ROY L. HERNDON,
Los Angeles, California,
Of Counsel.

Parker & Baird Company, Law Printers, Los Angeles.

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I.

STATEMENT OF THE CASE.

A. Factual Element.

The factual aspects of this case were presented to the California courts by way of an agreed statement [R. 20 to 34]. Concisely and chronologically stated, the material facts are as follows:

On February 27, 1933, The Union Trust Company of Cleveland, Ohio, failed, being on that date in an insolvent condition [R. 23]. Respondent Porter, a resident of California, was a stockholder in said banking corporation [R. 27].

On June 15, 1933, the Superintendent of Banks of Ohio took possession of said corporation and its assets for the purpose of commencing liquidation proceedings [R. 24].

On July 30, 1934, said Superintendent of Banks announced his findings as to the extent of the bank's insolvency and the fact that he was levying an assessment of one hundred per cent. upon the stockholders [R. 25, 34].

On May 29, 1936, action was commenced in the Superior Court of the State of California, in and for the county of Los Angeles, to enforce, as against respondent, the stockholder's liability created by Article XIII, Section 3, of the Constitution of the state of Ohio [R. 28]. In other words, the action was commenced more than three years after the failure of the bank, but less than three years after the Superintendent of Banks announced the levy of an assessment.

B. The Issues of Law.

Respondent interposed a plea that the action was barred by the applicable California statute of limitations.[1] That statute is quoted by petitioner at page 6 of the petition herein. Omitting inapplicable language, it reads as follows:

> "* * * Actions against * * * stockholders of a corporation * * * to enforce liability created by law * * * must be brought within three years after * * * liability was created."

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[1]Code of Civil Procedure of the State of California (1872), p. 93, Sec. 359;
Deering (1941), p. 152, Sec. 359.

As indicated by the language of the statute, and as settled by a long line of California decisions,[2] the starting point for the running of this statute is the date of the creation of the substantive liability.

Therefore, in determining the tenability of respondent's plea, the problem of the California courts was to determine the date when the Ohio substantive liability was created.

Petitioner and respondent, as well as the trial court, the intermediate appellate court and the Supreme Court of California, were in agreement that the question as to the time of the creation of this particular liability was referable to the law of Ohio. Although the fundamental rule is recognized that statutes of limitation are remedial, so that the law of the forum governs their application, the California courts have consistently held that the law of the corporate domicile determines the nature, the time and the mode of creation of a stockholder's liability. Up to this point the parties were in agreement, but here the divergence of contentions began.

Petitioner argued that the "assessment" was the basis of his action; that to hold that the California statute began to run prior to the levy of the assessment was to

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[2]*Hunt v. Ward*, 99 Cal. 612; 34 Pac. 335 (1893);
Gardiner v. Royer, 167 Cal. 238; 139 Pac. 75 (1914);
Miller v. Lane, 160 Cal. 90; 116 Pac. 58 (1911);
Royal Trust Co. v. MacBean, 168 Cal. 642; 144 Pac. 139 (1914);
Richardson v. Craig, 11 Cal. (2d) 131; 77 Pac. (2d) 1077 (1938);
Hospelhorn v. Van Dusen, 40 Cal. App. (2d) 257; 104 Pac. (2d) 888 (1940);
Hospelhorn v. Newhoff, 43 Cal. App. (2d) 678; 111 Pac. (2d) 688 (1941).

"go behind" the assessment and to deny it the full faith and credit to which it was entitled as a "public act" of Ohio.

Respondent has contended, and now contends, that the liability here involved matured and became fixed upon the date when the bank failed, and this by operation of the self-executing provision of the Ohio Constitution; that the assessment was purely a *procedural* step, having nothing to do with the creation of the *substantive* rights and correlative liabilities; that the Ohio liability was direct and primary and became enforceable by the bank's creditors upon the bank's failure; that the assessment was entitled to be given in California no greater effect than it was given by the decisions of the Ohio courts; and that a statute of limitations is not unconstitutional merely because its running does not await the taking of non-substantive or procedural steps by an administrative official having, under some circumstances, the exclusive power of enforcement.

As indicated by the record, respondent's position was sustained by the intermediate appellate court and by the Supreme Court of California.